

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



JOINT APPENDIX

**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

\_\_\_\_\_  
No. 17,946  
\_\_\_\_\_

872

CONNELL ROBINSON,

*Appellant,*

v.

UNITED STATES OF AMERICA,

*Appellee.*

\_\_\_\_\_  
APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
\_\_\_\_\_

United States Court of Appeals  
for the District of Columbia Circuit

FILED AUG 12 1963

*Nathan J. Paulson*  
CLERK

(i)

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JOINT APPENDIX

[Filed September 29, 1952]

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled June 30, 1952; Sworn in July 1, 1952

|                              |   |                        |
|------------------------------|---|------------------------|
| THE UNITED STATES OF AMERICA | ) | Criminal No. 1531-52   |
|                              | ) | Grand Jury No. 1401-52 |
| vs.                          | ) | Second Degree Murder   |
| CONNELL ROBINSON             | ) | (22-2403 D.C. Code)    |

The Grand Jury charges:

On or about August 19, 1952, within the District of Columbia,  
Connell Robinson with malice aforethought, murdered Samuel E. Cox  
by means of stabbing him with a knife.

/s/ Charles M. Ireland  
Attorney of the United States  
in and for the District of Columbia.

A TRUE BILL:

/s/ Thomas J. Shea, Jr.  
Foreman.

---

[Filed October 7, 1952]

PLEA OF DEFENDANT

On this 3rd day of October, 1952, the defendant Connell Robinson,  
appearing in proper person and by his attorney, Foster Wood, Esquire,  
being arraigned in open Court upon the indictment, the substance of the  
charge being stated to him, pleads not guilty thereto.

The defendant is remanded to the District of Columbia Jail.

By direction of  
David A. Pine  
Presiding Judge  
Criminal Court #2

\* \* \*

\* \* \*

---

[Filed February 10, 1953]

CLERK'S CERTIFICATE - VERDICT

On this 10th day of February, 1953, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited yesterday; whereupon the alternate jurors Rowena McWilliams and David S. Martin are discharged from further consideration in this case and thereupon the said jury upon their oath say that the defendant is guilty as indicted.

The case is referred to the Probation Officer of the Court and the defendant is remanded to the District Jail.

By direction of  
Charles F. McLaughlin  
Presiding Judge  
Criminal Court #3

\* \* \*

\* \* \*

---

[Filed February 16, 1953]

MOTION FOR A NEW TRIAL

Now comes the defendant, Connell Robinson, by his attorney, Foster Wood, and moves the Court to set aside the verdict rendered herein and to grant a new trial for the following reasons:

1. The verdict is contrary to the evidence and to the weight of the evidence.
2. The Court erred in admitting evidence over the objection of the Counsel for the defense.
3. The Court erred in permitting the government to place the witness Hodges on the stand as a rebuttle witness for the sole purpose of introducing inadmissible evidence and statements made by said Hodges to the police.

4. Because of improper statements by Counsel for the government to the jury and for other errors apparent of record.

/s/ Foster Wood,  
Attorney for Defendant  
426 5th St., N. W.  
Washington, D. C.

A copy of the foregoing motion served upon the United States District attorney this 12th day of February, 1953:

/s/ Foster Wood

---

[Filed March 13, 1953]

CLERK'S CERTIFICATE -

DENIAL OF DEFT'S MOTION FOR NEW TRIAL

On this 13th day of March, 1953, came the attorney of the United States; the defendant in proper person and by his attorney Foster Wood, Esquire; whereupon the defendant's motion for new trial, coming on to be heard, after argument by counsel, is by Court denied.

The defendant is remanded to the District Jail.

By direction of

Charles F. McLaughlin  
Presiding Judge  
Criminal Court #3

\* \* \*

\* \* \*

---

[Filed March 27, 1953]

JUDGMENT AND COMMITMENT

On this 27th day of March, 1953 came the attorney for the government and the defendant appeared in person and by counsel, Foster Wood, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Second Degree

Murder as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years to Twenty (20) years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Charles F. McLaughlin  
United States District Judge

---

[ Filed April 6, 1953 ]

#### NOTICE OF APPEAL

Name and address of appellant - Connell Robinson, 200 19th St., S. E.

Name and address of appellant's attorney - Foster Wood, 416 Fifth St., N. W.

Offense - Murder 2nd degree

Concise statement of judgment or order, giving date, and any sentence -  
March 27, 1953, sentenced to from five to twenty years

Name of institution where now confined, if not on bail - D. C. JAIL,  
200 19th St., S. E.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

April 6, 1953  
Date

/s/ Connell Robinson  
Appellant per F.W.

/s/ Foster Wood  
Attorney for Appellant.

---

[Filed January 10, 1963]

MOTION TO VACATE SENTENCE AND JUDGMENT PUR-  
SUANT TO TITLE 28 SECTION 2255? WITH AFFIDA-  
VIT IN SUPPORT? TO PROCEED IN FORMA PAUPERIS  
WITHOUT PREPAYMENT OF COSTS

JURISDICTION STATEMENT

The United States District Court for the District of Columbia has jurisdiction over this motion by Vacate of sentence under Section 2255.

Comes now CONNELL ROBINSON, the petitioner, Pro - Se, who respectfully move this Honorable Court for issuance of an order to Vacate judgment and sentence, imposed upon him by this court; and allow him to proceed in forma pauperis, in the above - entitled cause.

Section 2255 permit the issue of ineffective representation by counsel be raise by motion to vacate sentence whether the grounds assigned are Constitutional Nature. UNITED STATES: BARRON AND HOLTZOFF, Federal and Procedures 402, (195).

The allegation made by a prisoner in a motion to vacate sentence under section 2255 must be assumed to be true, except if such allegation can be demonstrated by the files and the records to be untrue. (See SMITH V. U.S., 223 F. 2d. 750, (C.A.5). WRIGHT V. JOHNSON, 77 F. 691 (DCMC) (1949), Quote, the court held that where a new question was presented to the court, that it should re-judicate the question that was raised according to law, instead of dismissing the writ without a hearing." Petitioner first argue the point of ineffective assistance of counsel in that the evidence against the petitioner was not sufficient to sustain a judgment of conviction in any event; to wit.

The original Indictment 15-31-52, was in conflict of itself by charging your petitioner with malice aforethought, when your petitioner was fighting for his life. SEE PEOPLE V. CARUSO, 246 N.Y. 437, 159 N.E. 390 (1927). Your petitioner has yet to receive Due Process of Law with a fair an impartial trial. Note: According to Judge Charles E. Burkes of Virginia, in the Washington Even Star News Paper September 13, 1961; "their mission (judges) was to set and see that justice is administered according to law that all the defendants are entitled to a



fair an impartial trial whether have money or influential political friends."

The Records of Court will prove that if defense counsel had thoroughly investigated this case and argue the points of vasis of complainant allegation, the trial jury would have found the petitioner not guilty as charged. It is to be further noted that petitioner is a layman at law, and have no knowledge of its procedures.

#### STATEMENT OF CASE

Comes now petitioner, CONNELL ROBINSON, pro - se., and says that he (petitioner), came to Washington, D. C., from Charlotte, N. C., to seek a job as a cook. The petitioner found a job and went to work as a cook, at a Hot Shop located at College Park, Maryland. Petitioner further says that he (petitioner), worked there for a while and quit because he (petitioner), was not making enough money to support himself, and six (6) childrens, so petitioner got another job at a Flag Ship as a cook, approximately three (3) months later petitioner's Cousin came to Washington from Charlotte, N. C., to see if he could he get a job. One morning about 8: A.M., Mr. George Masse, came over to my house and he (Mr. George Masse), wanted me to show him around the city, and help him get a job. We went to several places seeking a job for him, but was unable to find one that morning. Later that afternoon we started drinking some beer and about 12:30 midnight we went to a store and bought some clams on fourth (4th) Street, S. W., Washington, D. C., and I (Connell Robinson), borrowed my cousin's knife to open the clams with, and when I finished with the knife I put it in my pocket by a mistake. We left there about 1:30 A.M., the next morning. As we were walking down fourth Street, S.W. Washington, D.C., looking for a cab to take us home, we met two (2) men by the name of Hodge and Houston, we asked them where we could but some whiskey at this time of morning. They told us that they had a friend that sold whiskey, we could buy some there. We asked them how far it was, Hodge said just around the corner, we went about two (2) blocks and went into a alley and as we were going

up the alley, I asked Hodge again how far was the place, and Hodge said it isent far. So I told him that they could forget it, we were turning back, both of them reply come on. So I told him that they

So we went on with them to this place, in whom they said was their friend and this first place went, the lady said that she did not have any whiskey. So those two (2) men kept on insisting that we go to another place that sold whiskey, and when we arrived at this house, Hodge knocked on the door and some one replied come in. We went into this house and was offered a seat at a little table. A few minutes later a man by the name of Sam Cox, and Hodge started to arguing about somethings and Sam Cox told Hodge that he was a no good M.F., you have been messing with my old lady. It was kind of dark in this house and I tried to turn the lamp up that was setting on this little table where we were sitting at, and when I did Sam Cox, told the petitioner don't not mess with that lamp you no good M.F., so petitioner got up from the table and he (Sam Cox), jumped up from the table and started around the table where your petitioner was sitting, swinging at petitioner with somethings in his hand your petiticner did not know he had a knife at this time. Petitioner was trying to keep out of his way, but was unable to keep this man from cutting him. Petitioner further states that he had to fight his way out of this house to save his life. petitioner also; was stabb in one of his arms and cut on the hand in which required seven (7) stitches, and was hit on his leg from behind, petitioner was treated at the D.C. Jail Hospital. Petitioner and his cousin both ran to fourth (4th) Street, S.W., and caught a cab. Petitioner's Cousin pulled off his shirt to bind up petitioner wounds and I (Connell Robinson), took my hankerchief and tied it around the wound to stop the flow of blood until I could get home and call the police. The cab driver stop the police officers and sent them to my home. The polices came to my house and they came on in, and placed your petitioner under arrest and taken petitioner to the Hospital and where petitioner was treated by a Doctor, in which some several stitches was taken upon your petitioner wounds.

Petitioner was taken from the Hospital by the police officers and carried to number one (1) Precinct about 4:00 A.M. Petitioner and his cousin came from the hospital and the police brought those two (2) men out of a room, these men was the same men that carried us to this house. The police officer asked the man's wife which one of these men was her husband fighting with, so his wife pointed out Hodges. So Petitioner said "no lady", your husband was fighting me, and he also did cut me with his knife. This was about 5: A.M., that morning. Your petitioner further states that he had not close his eyes, and your petitioner was weak from bleeding. Petitioner was taken from there into a room by the police officers to make a statement. While this was taken place, your petitioner fell asleep. When the officer was finished typing the statement they woke your petitioner up for him to signed the statement. Petitioner signed the statement by not known what he was signing is because that your petitioner was tired, weak, and sleepy. Your petitioner states that he had not had any sleep from 8: A.M., that morning until the next morning without any sleep, this being about 10 hours, and also without the aid of counsel to advise petitioner of his right, and to keep him from signing this statement. See FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 5 (a) appearance before the commissioner an officer making an arrest under a warrant issue upon a complaint or any person making an arrest without unnecessary delay before any other nearly by available commissioner or before any other near by officer empowered to commit persons charged with offenses against the laws of the United States, when a person arrested without a warrant is brought before a commissioner or other officers, a complaint shall be filed forthwith, Rule 52 (b), Federal Rules of Criminal Procedure;

(b) Plain error, plain error no affecting substantial right may be noticed although they were not brought to the attention of the Court Note; an arrest without a warrant when there is opportunity to obtain a warrant is an illegal arrest. Sec. 4 140 District of Columbia Code: Arrest without warrant. The several members of the police force shall have



power and authority to immediately arrest, without warrant, and to take into custody any person who shall commit, or threaten or attempt to commit, in the presence of such member, or within this view, and breach of the peace or offense directly prohibited by Act., of Congress or by any law or ordinance in force in the District, but such member or the police force) shall immediately, and without delay, upon such arrest, convey in person such offender before the proper Court, that he may be dealt with according to law. GLASSER V. UNITED, 315 U.S. 60, 70, 62 S. Ct. 457, 456, (1952). QUOTE: To preserve the protection of the Bill Of Rights for hard-pressed defendants, we indulge every reasonable presumption against waivers of fundamental Rights."

CONFESSIONS VOID: In WATTS V. INDIANA, SUPREME COURT (1946), 338 U.S. 49, 69 S. Ct. 1347, 93 F. Ed. 1801; It Stated: Under our system Society carries the burden of proving the charges against the accused, not out of his own mouth, it must establish its own case, not by interrogation of the accused even under judicial safeguard; but by evidence independently secured through skillful investigation. CIRCUIT JUDGE PROCTOR, WRITING IN COPLON V. UNITED STATES, 191 F. 2d. 749, 10 wrote: Precious though the right to aid of counsel may be as a safeguard to life and liberty, it is not a fetish, to be worshipped blindly. (1d 89 U.S. App. at page. 115, 191 F. 2d. at page 761 which was on conductive to certainly in mind, yet I am abiding doubt and I feel bound to express it, WEST V. LOUISIANA, 194 U.S. 258, S. Ct. 650 L. Ed. 965; the court said: The due process clause places upon this Court, the duty of exercising a judgment with the narrow confines of judicial power, and in the TIGNER V. TEXAS, 310 U.S. 141, 147: The equality at which the equal protection clause aims, is not disembodied equality.

1. Counsel failed to thoroughly investigate the case.
2. Counsel failed to summon witnesses that would testify in petitioner behalf, which was the Key Witness for the defendant, by refusing to summon witness was a violation of the fifth (5) Amendment of the United States Constitution. See (5) Amendment.

b. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the States and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. U.S. Constitution, Amendment 6.

c. The United States District Court for the District of Columbia in general term shall have full power and authority from time to time to make such rules as it may deem proper respecting the examination, qualification, and admission of persons to membership in its bar and their censure, suspension, and expulsion; and every person so admitted, before he shall be at liberty to practice therein, shall take and subscribe the following oath: I, \_\_\_\_\_, do solemnly swear (or affirm) that I will demean myself as a member of the bar of this court uprightly and according to law, and that I will support the Constitution of the United States. 11 D.C. Code Sec. 1301.

#### EFFECTIVE ASSISTANCE OF COUNSEL

A defendant in a criminal case may not be legally guilty except in a trial in which his constitutional Rights are scrupulously observed, no matter how overwhelming the evidence of guilt. If the accused is denied the effective assistance of counsel or any other element of due process of law, without it, which he can not be deprived of life or liberty. Deprivation of these fundamental rights goes the essence of a fair trial and effective assistance of counsel, *COPLON V. U.S.* 1951, C.A.D.C. 103 114, 191 F. 2d. 749, 760, *FRANK V. U.S. MANERRUM*, at 37 U.S. 309, 330, 331, 1915. *DRINKER LEGAL ETHICS*, (1953) P. 62 *U.S. V. WRIGHT*, 176 F. 2d. 376 (C.A.-2) *VON MOLTKE V. GILLIES*, 332 U.S. 708. See *POWELL V. ALABAMA*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L. R. 527, which states in part: "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and

that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. \* \* \*

What, then, does a hearing include. Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be brute of men of intelligence, how much more true, is it of the ignorant and illiterate, or those of feeble intellect. If in any case civil or criminal, at state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of Due Process in the Constitutional sense.

#### PROOF OF SERVICE

I, CONNELL ROBINSON, being first duly sworn according to law, on oath depose and says that the matters and things stated in the foregoing petition and affidavit by me described as facts are true, and that these matters and things stated herein as upon information and belief I believe to be true, and that I have this \_\_\_\_\_ day of \_\_\_\_\_ 1963, mailed a copy of the foregoing affidavit postage prepaid and motion to

Mr. David C. Acheson, U.S. Attorney for the District of Columbia at his address Washington 1, D. C.

/s/ Connell Robinson  
Petitioner Pro - Se

[Jurat dated January 9, 1963]

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[Filed February 14, 1963]

#### OPPOSITION TO MOTION TO VACATE

Comes now the United States by its attorney, the United States Attorney for the District of Columbia, and in opposition to the defendant's "Motion To Vacate Sentence And Judgment Pursuant To Title 28 Section 2255 With Affidavit In Support, To Proceed in Forma Pauperis Without Prepayment Of Costs", filed January 10, 1963, represents to the Court the following:

1. Connell Robinson was indicted September 29, 1952 on a charge of murder in the second degree. Subsequently, represented by retained counsel, he was tried by a jury and found guilty as indicted on February 10, 1953. Counsel filed a motion for a new trial which was heard and denied on March 13, 1953 and on March 27 the defendant was sentenced to serve 5 to 20 years imprisonment.

2. Counsel then filed an application for leave to appeal in forma pauperis which was granted along with a transcript of the trial proceedings. On July 8, 1954 there was filed a mandate from the Court of Appeals dismissing the appeal (No. 11,800). Then followed a motion to obtain documentary entries which was granted by the trial court on July 16, 1956 and a motion to vacate sentence pursuant to Section 2255, filed July 20, 1956. Counsel was specially appointed to represent the defendant for the purposes of this motion but on March 1, 1957 the motion was withdrawn by the defendant in open court with counsel present.

3. Now, as of January 10, 1963, Robinson has filed his second 2255 motion. It appears that Robinson is alleging ineffective assistance



of counsel on the grounds that counsel failed to thoroughly investigate the case and in failing to summons witnesses. In what respect counsel failed thoroughly to investigate the case is not mentioned. There is also no mention made of what witnesses were not called and what their testimony would have been. It is well settled that the mere charge of ineffective assistance of counsel, without supporting factual allegations, is insufficient to require a hearing. Martin v. U. S., 101 U.S. App. D.C. 329, 248 F.2d 651 (1957); Moore v. U. S., 101 U.S. App. D.C. 412, 249 F.2d 504 (1957); Hall v. U. S., 98 U.S. App. D.C. 341, 341, 235 F.2d 838 cert. denied, 352 U.S. 936 (1956); Adams v. U. S., 95 U.S. App. D.C. 354, 222 F.2d 45 (1955). There is also mention of an illegal confession but this issue cannot be raised by a motion to vacate in lieu of a direct appeal on the merits.<sup>1/</sup> As stated previously, Robinson had been granted a direct appeal in forma pauperis with a transcript of the trial proceedings prepared at Government expense and this appeal was subsequently dismissed by the Court of Appeals.

WHEREFORE it is respectfully submitted that the motion should be denied on the ground that the motion and the files and records in the case conclusively show that defendant is entitled to no relief.

/s/ David C. Acheson  
United States Attorney

/s/ Charles T. Duncan,  
Principal Assistant United States  
Attorney

/s/ Oscar Altshuler  
Assistant United States Attorney

[Certificate of Service]

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<sup>1/</sup> Smith v. U. S., 88 U.S. App. D.C. 80, 187 F. 2d 192, (1950), cert. denied, 341 U.S. 927 (1951).

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[Filed March 8, 1963]

O R D E R

This matter comes before the Court on the Defendant's Motion for leave to file in forma pauperis and Defendant's Motion to vacate judgment and set aside sentence pursuant to Title 28, U. S. Code, Section 2255.

Connell Robinson was indicted September 29, 1952 on a charge of murder in the second degree. Subsequently, represented by retained counsel, he was tried by a jury and found guilty as indicted on February 10, 1953. Counsel filed a motion for a new trial which was heard and denied on March 13, 1953 and on March 27 the Defendant was sentenced to serve five (5) to twenty (20) years imprisonment.

Counsel then filed an application for leave to appeal in forma pauperis which was granted along with a transcript of the trial proceedings. On July 8, 1954 there was filed a mandate from the Court of Appeals dismissing the appeal (No. 11,800). Then followed a motion to obtain documentary entries which was granted by the trial court on July 16, 1956 and a motion to vacate sentence pursuant to Section 2255, filed July 20, 1956. Counsel was specially appointed to represent the Defendant for the purposes of this motion but on March 1, 1957 the motion was withdrawn by the Defendant in open Court with counsel present. Now, as of January 10, 1963, Robinson has filed his second 2255 Motion.

The Motion having been filed by the Defendant, pro se, the Court having fully considered same and having considered it in a light most favorable to Defendant, considers that the following are the Defendant's contentions in said motion: (1) that the indictment was fatally defective; (2) that the Defendant was not guilty; (3) that there was insufficient evidence to sustain a verdict; (4) that his confession was illegally obtained; and finally (5) that he was ineffectively represented by counsel.

Defendant's attack on the indictment is that said indictment alleged malice when it was clear that Defendant's actions amounted to self-defense. Thus, this purported ground for relief is clearly without merit.



The general rule is that a motion under Section 2255 will not lie where there are allegations that constitutional rights have been infringed when such purported errors are subject to correction on appeal, and, as stated previously, the petitioner had been granted a direct appeal in forma pauperis with a transcript of the trial proceedings prepared at Government expense and this appeal was subsequently dismissed by the Court of Appeals. Such was the case here and a motion under Section 2255 may not be used as a substitute for the regular judicial process of trial and review. Smith v. United States, 88 U. S. App. D. C. 80, 85-86, affm's 187 F. 2d 192, 197-198 (1950), cert. denied, 341 U. S. 927 (1951). More specifically, a motion under this Section will not lie on the alleged grounds that the Defendant is not guilty, Adam v. United States, 274 F. 2d 880 (10th Cir. 1960); that the evidence is insufficient to sustain the conviction, Upshaw v. United States, 252 F. 2d 863 (D.C. Cir. 1958); or that the confession was illegally obtained, Hodges v. United States, 156 F. Supp. 313 (D. C. DC 1957).

The general allegation made by the Defendant of ineffective assistance of counsel in that the evidence was insufficient to sustain a judgment of conviction is not such an allegation as to require the Court to conduct a hearing in this proceeding. The allegation that counsel failed to summon a key witness without identifying that witness or stating what the substance of his testimony would have been is also insufficient to require a hearing. See Adams v. United States, 222 F. 2d 45 (D.C. Cir. 1955). For such a claim to succeed, it must be shown that the proceedings were a farce and a mockery of justice, Adams, supra, p. 47, and such was not the case here.

On the basis of the facts and the law herein set out and upon full consideration of the files and records in this case, and the Court being fully advised in the premises, and it appearing conclusively that the Defendant is entitled to no relief, it is by the Court his 7th day of March, 1963,

ORDERED, That the Motion for leave to file in forma pauperis is hereby granted, and it is

FURTHER ORDERED, That the Motion to vacate judgment and set aside sentence pursuant to Title 28, U. S. Code, Section 2255 be, and the same is hereby, denied.

/s/ Charles F. McLaughlin  
Judge

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BRIEF FOR APPELLANT, CONNELL ROBINSON

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE  
DISTRICT OF COLUMBIA

---

No. 17,946

---

CONNELL ROBINSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

REVIEW OF THE DENIAL OF APPELLANT'S  
MOTION TO VACATE SENTENCE UNDER 28 U. S. C. 2255

United States Court of Appeals  
for the District of Columbia Circuit

FILED AUG 19 1963

*Nathan J. Paulson*  
CLERK

Irving B. Yochelson  
Mervyn I. Aronoff  
C. Richard Beyda  
1707 H Street, N. W.  
Washington 6, D. C.

(Appointed by this Court)

## STATEMENT OF QUESTIONS PRESENTED

1. May this Court, on appeal from a denial of a motion to vacate sentence under 28 U.S.C. 2255, exercise its jurisdiction and authority under Rule 39(a) of the Federal Rules of Criminal Procedure and decide, instead, an appeal from appellant's original judgment of conviction, where the facts show: (1) a notice of appeal from the original judgment of conviction was duly filed, and leave was granted appellant to appeal in forma pauperis, (2) appellant's counsel abandoned him, without informing the Court, and thereby allowed the time for perfecting the appeal to lapse, (3) appellant, left unassisted, was incarcerated and ignorant of his rights and of the steps necessary to prosecute an appeal.
2. On the facts outlined above, was there "excusable neglect," on the part of appellant so that this Court, under Rule 45(b)(2) of the Federal Rules of Criminal Procedure, may hear the appeal from appellant's original judgment of conviction.
3. Was there error in the trial proceedings when:
  - a. The Trial Court permitted counsel for the Government, in his closing argument, to read to the jury the statement of a witness which had, in fact, been excluded from evidence during the Government's case for lack of a proper foundation.
  - b. The Trial Court refused to charge the jury that it could infer from the Government's failure to produce an eye witness that the testimony of such witness would have been detrimental to the Government's case only, and not to defendant's case.

c. The Trial Court, during the presentation of defendant's case, allowed the Government's witness to testify in rebuttal on matters that were covered on direct and redirect examination by the Government during the presentation of its case.



IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE  
DISTRICT OF COLUMBIA

---

No. 17,946

---

CONNELL ROBINSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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### JURISDICTIONAL STATEMENT

The jurisdiction of this Court is founded upon the terms and provisions of Title 28, United States Code, Section 2255, 63 Stat. 105. Appellant brought in the United States District Court for the District of Columbia a motion to vacate sentence and judgment pursuant to Title 28, United States Code, Section 2255. (J.A. 5) From the Order entered by the District Court denying this motion (J.A. 14), appellant brings this appeal.

### STATEMENT OF CASE

The instant appeal testing the denial by the District Court of appellant's motion to vacate sentence under 28 U.S.C. 2255, is the most current in a chain of events leading back over a period of almost eleven years. Connell Robinson was indicted September 29, 1952 (J.A. 1) on a charge of murder in the second degree. He was tried and found guilty as indicted on February 10, 1953. (J.A. 2) A motion for a new trial was filed on February 12, 1953 (J.A. 2) and denied by the District Court on March 13, 1953. (J.A. 3) On March 27, 1953, the defendant was sentenced to serve five to twenty years imprisonment.

On April 6, 1953, an application for leave to appeal in forma pauperis and a notice of appeal was duly filed. (J.A. 4) On July 8, 1954, there was filed a Mandate from the Court of Appeals dismissing the appeal (No. 11,800) for failure to file a brief within the time prescribed in the Rules of the Court.

A motion to vacate sentence under 28 U.S.C. 2255 was then filed on July 20, 1956. The motion was withdrawn, however, by the appellant in open court with counsel present. The appellant states (not in the Record) that counsel at that time advised him that this would be in his best interests but no reasons were given except that he had a good chance for parole and an appeal could jeopardize the parole.

On January 10, 1963, the appellant filed in the District Court his second motion to vacate sentence under 28 U.S.C. 2255. (J.A. 5). The United States Attorney for the District of Columbia filed an Opposition to this motion. (J.A. 12). On February 27, 1963, appellant filed a Reply to the Government's Opposition, in which he stated that the appeal from his original conviction was not perfected within the time limit due to his counsel's abandoning him for failure to pay a \$25.00 fee. (Reply of Defendant to Government's Opposition, p. 2). On March 8, 1963, the District Court issued an Order denying appellant's motion to vacate sentence under 28 U.S.C. 2255 without a hearing. From the denial of this motion, appellant brings the instant appeal.

#### RULES INVOLVED

Rules 39(a), 39(c) and 45(b)(2), Federal Rules of Criminal Procedure.  
(See Appendix to this brief).

### STATEMENT OF POINTS

- I. Despite the nature of the instant appeal, it is within the jurisdiction and supervisory authority of this Court, under Rules 39(a) and 45(b)(2) of the Federal Rules of Criminal Procedure, to hear and decide an appeal from appellant's original judgment of conviction, since the facts show that appellant's failure to perfect his original appeal was the result of "excusable neglect".
- II. There were errors in the Trial proceedings which justify reversal of the conviction:
  - A. The Trial Court erred in permitting counsel for the Government in his closing argument to read to the jury the statement of a witness which had, in fact, been excluded from evidence during the Government's case for lack of a proper foundation.
  - B. The Trial Court erred in refusing to charge the jury that it could infer from the Government's failure to produce an eye witness that the testimony of such witness would have been detrimental to the Government's case only, and not to defendant's case.
  - C. The Trial Court erred in allowing Government counsel, during the presentation of defendant's case, to examine a rebuttal witness on matters that were covered on direct and redirect examination by the Government during the presentation of its own case.

### SUMMARY OF ARGUMENT

Appellant was tried and convicted of second degree murder on February 10, 1953. Subsequent thereto, appellant was granted leave to appeal in forma pauperis. He duly filed within the applicable time limit a Notice of Appeal and a Statement of Errors. Appellant then incurred the following difficulties:

- (1) Appellant's counsel abandoned him, without informing the Court and requesting another attorney be appointed.
- (2) Appellant was left unassisted and unadvised as to what steps to take to perfect his appeal which was pending.
- (3) Appellant was incarcerated, impecunious, and ignorant of the procedure and manner in which to perfect his appeal.
- (4) The time for perfecting his appeal lapsed. This Court issued a Mandate dismissing the appeal for failure to file a brief.
- (5) Under the circumstances, this Court could not have been aware at the time that appellant, through no fault of his own, was having difficulties perfecting his appeal.

Although the instant appeal is from the District Court's denial of a motion to vacate sentence under 28 U.S.C. 2255, this Court has the power to hear a direct appeal from the original judgment of conviction itself. Rule 45(b)(2) of the Federal Rules of Criminal Procedure explicitly provides that for cause shown this Court upon motion may permit an appeal to be perfected after the expiration of the time specified in Rule 39(c), if the failure to do so within that time was the result of "excusable neglect." Rule 39(a) gives this Court



supervision and control over "proceedings on appeal," with power to consider an appeal perfected out of time, once this Court has obtained jurisdiction by the filing of a notice of appeal within the time limit.

On the facts outlined above, it is submitted that the circumstances exist for this Court to hear a direct appeal from appellant's original judgment of conviction.

Assuming this Court will hear the instant appeal as a direct appeal from the original judgment of conviction, the Record indicates errors in the Trial proceedings which justify reversal of the conviction.

The Trial Court permitted Government's counsel to read to the jury, during his closing argument, a statement of a witness which had been declared inadmissible by the Trial Court during the Government's case. Such error was most prejudicial to defendant and the persuasive effect it had on the jury is incalculable.

The Trial Court erred in giving an instruction to the jury which allowed it to infer that the testimony of an unproduced witness would have been detrimental to the defendant's case. Since the unproduced witness was within the control of the Government and counsel for the Government had previously indicated that he would use the witness in his case, the jury should have been instructed that it could infer that the testimony of such witness would have been detrimental to the Government's case, not the defendant's.

The Trial Court erred in permitting counsel for the Government to question a witness, called for rebuttal purposes only, on matters already gone into on direct and redirect examination during the

Government's case. Such activity interrupted and prejudiced the defendant's case which was then being presented by defendant's counsel.

The foregoing errors could not help but affect the verdict of the jury on the issue of self-defense or the degree of homicide. For this reason, the conviction should be reversed.

#### ARGUMENT

- I. Despite the nature of the instant appeal, it is within the jurisdiction and supervisory authority of this Court, under Rules 39(a) and 45(b)(2) of the Federal Rules of Criminal Procedure, to hear and decide an appeal from appellant's original judgment of conviction, since the facts clearly show that appellant's failure to perfect his original appeal was the result of "excusable neglect".

In Belton v. United States 104 U.S. App. D. C. 81, 259 F. 2d. 811, appellant, several years after his conviction, brought a motion to vacate sentence under 28 U.S.C. 2255. On appeal from the denial of such motion, this Court looked into the circumstances of appellant's attempt to appeal from his original conviction. It found that appellant's failure to perfect his appeal was the result of excusable neglect in that appellant, an illiterate pauper who was without aid of counsel, believed the denial of his request for leave to appeal in forma pauperis was a denial of an appeal as such, and thus took no steps to perfect his appeal within the time limit. Holding that the appellant's letter requesting leave to appeal in forma pauperis constituted a "notice of appeal," the Court ruled that it still had jurisdiction of the direct appeal from the original judgment of conviction itself, under either Rule 45(b)(2) or 39(a) of the

Federal Rules of Criminal Procedure. The Court said, at p. 85:

"... Rule 45(b)(2) explicitly provides that for cause shown we may upon motion permit an appeal to be perfected after the expiration of the time specified in Rule 39(c), if the failure to do so within that time was the result of excusable neglect. . ."

"Aside from the question of excusable neglect on the part of appellant in perfecting the appeal within the usual time we have reached the merits of the appeal upon another and independent ground. Rule 39(a), . . . places under our "supervision and control" the "proceedings on appeal." Within this supervisory authority this Court has held that we have the power to consider an appeal on a record filed out of time, once we have obtained jurisdiction by the filing of a notice of appeal within time, as was here done."

The Court thereupon heard the merits of the case as on direct appeal, reversed the conviction, and dismissed the appeal from denial of the section 2255 motion as moot.

The situation at bar fits squarely within the holding and rationale of the Belton case. Here, appellant, after his conviction, retained his trial counsel on the latter's belief and advice that appealable errors were committed in the trial proceedings. Trial counsel filed a notice of appeal (J.A. 4), a motion for leave to appeal in forma pauperis, which was granted, and a statement of errors (Record, filed April 9, 1953); but due to the fact that appellant was indigent and thus unable to pay the \$25.00 fee requested, trial counsel refused to take any further action and permitted the appeal to lapse. (Record, Reply of Defendant to Opposition of Government to Motion to Vacate Sentence and Judgment under 28 U.S.C. 2255, p. 2). The appellant--incarcerated, impecunious, and ignorant as to what steps he should take to perfect his appeal--was left unassisted.

As a result, this Court issued a Mandate dismissing the appeal for failure to file a brief within the time limit. (Record, filed July 8, 1954).

Trial counsel, in complete disregard for appellant's rights, failed to perform the indispensable formality of notifying the Court of his intention to withdraw from the case while the appeal was pending and requesting the Court to appoint another attorney. Neither did he inform appellant as to what procedure he should follow to perfect his appeal. It is difficult to conceive of a more patent example of ineffective assistance of counsel. Indeed, it is tantamount to no assistance of counsel at all.

Under the circumstances, neither the Trial Court nor this Court could have had any awareness, at the time, of the fact that appellant was encountering difficulty in prosecuting an appeal from his conviction. It now reaches the Court's cognizance for the first time. Although quite a few years have elapsed since appellant's conviction and the filing of his notice of appeal, this Court has within its power the ability to correct the injustice suffered by appellant. As the Court said in Belton v. United States, supra, at p. 86, after quoting from Chief Judge Stephens opinion in Christoffel v. United States, 88 U.S. App. D. C. 1, 190 F. 2d. 585, 590:

"Thus it is clear that once this Court has jurisdiction of an appeal the procedural Rules, though designed for the expeditious and orderly progression of a case, contain within themselves provisions which prevent imprisonment of the court within rigid time schedules that would defeat the interests of justice. And of course the fact that appellant has long been in confinement cannot be ground for denying relief under the principles set forth in Christoffel. On the contrary.

While remembering that the administration of criminal justice by appellate as well as other courts must be within the law which includes those rules of procedure that are binding, we must also not forget that, subject to these limitations, it is never too late to rectify serious error."

We submit that the appellant in this case is in the same position as the appellant in the Belton case. We respectfully request that this honorable Court follow the ruling of the Belton case, apply Rules 45(b)(2) and 39(a), and hear the merits as on direct appeal from appellant's conviction.

Assuming, therefore, under the foregoing authority, that this Court will exercise its discretion to consider the present appeal as an appeal from the original conviction, the query remains whether or not error exists in the original trial which calls for reversal of the conviction. We respectfully maintain that such error is patent upon the face of the Record.

II. There were errors in the Trial proceedings which affected the verdict of the jury on the issue of self-defense and the degree of homicide, and therefore justify reversal of the conviction:

A. The Court below erred in permitting counsel for the Government to use the statement of the witness Hodge in the Government's closing argument when this statement had in fact not been admitted in evidence during the presentation of the Government's case for lack of a proper foundation. (Tr. 38, 39).

The use of this statement by counsel for the Government in his closing argument (Tr. 169), was most damaging to the defendant's case as it indicated that the defendant had wilfully "started cutting," the deceased with malice. This statement was not admitted into

evidence when originally offered because it lacked a proper foundation. Although the statement was given to the witness to read and sign at the time it was given to the police, it was brought out at the trial that the witness could neither read nor write. The granting by the Trial Court to Government's counsel of permission to read from a previously rejected document in final argument, over objection of defendant's counsel, constituted grave and prejudicial error and was irretrievably damaging <sup>to</sup> the defendant. Defendant's counsel objected to the admission of this statement when it was first introduced (Tr. 38, 39), and twice during the Government's closing argument. (Tr. 169, 200). This Court has held that reading to the jury, by Government counsel, an inadmissible statement constitutes reversible error. Belton v. United States 104 U.S. App. D. C. 81, 259 F. 2d. 811 (1958). In that case the Court said, at p. 84:

"In view of the evidence which was properly before the jury it is impossible to avoid the conclusion that the conduct of the prosecution might have affected the verdict of the jury, on the issue of self-defense or the degree of homicide, by leading them to believe that evidence against appellant of a damaging character existed which the court would not permit the jury to hear. This grew out of tactics which violated the rulings of the court and appellant's right to a trial on the evidence given under oath from the witness stand rather than given in effect by the prosecutor from counsel table."

B. The Court below further erred in its charge to the jury. The usual instruction concerning the inference that a juror may draw from the fact that a vital witness was not produced at a trial when such witness is available to both sides, was given by the Court, rather than the proper one. (Tr. 207).



The facts in the case clearly indicate that the missing witness was with the defendant at the time of the fight and could have given vital testimony concerning the actions of the defendant and the deceased. Counsel for the defendant stated that he planned to bring the witness Houston but that he was informed by the Government's counsel that the witness was to be brought by the Government. (Tr. 202). The Government's counsel stated that he knew this witness had been in jail at approximately the time of the trial and thus indicated that he knew the whereabouts of the witness. Failure to produce the witness, therefore, was the fault of the Government's entirely. An instruction to the jury that it could infer that the missing witness's testimony would have been damaging to only the Government's case, should have been given. In Beekman v. United States 155 F. 2d. 580, a case from the Second Circuit, the Court said, at p. 584:

"It is sometimes said that no inference can be drawn against a party for failure to call a witness equally available to both parties and some courts have indicated that it is error for counsel to comment on such failure. Even if that rule were to be followed, it would not apply where there is likelihood of bias on the part of the person not called as a witness in favor of one party, for then that person is not in a true sense "equally available" to both parties."

C. The Court further erred in allowing the Government to have the witness Hodge testify in rebuttal. (Tr. 157)., after he had been questioned on direct and redirect examination.

The testimony elicited by Government counsel in rebuttal was not rebuttal evidence at all. It was simply unwarranted repetition of the witness's earlier testimony. The action of Government counsel resulted in an abuse of the rebuttal privilege in that all that was accomplished was a continual harassment of the witness during the time

that defendant was presenting his case. Although the Government declared the witness hostile (Tr. 36), the effect of bringing him back at this time to testify to certain facts concerning the fight (Tr. 159, 161), amounted to a final attempt to sway the jury and nothing more. No doubt it did sway the jury. The effect was therefore damaging and prejudicial to defendant and constitutes reversible error, since the Trial Court allowed this evidence to remain over the strenuous objection of defendant's counsel. (Tr. 158, 159, 160).

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should:

- (1) Hear and decide on the merits an appeal from appellant's original judgment of conviction, and dismiss the Section 2255 appeal as moot.
- (2) Reverse the conviction.

Respectfully submitted,

Irving B. Yochelson  
Mervyn I. Aronoff  
C. Richard Beyda  
1707 H Street, N. W.  
Washington 6, D. C.

Attorneys for Appellant  
appointed by this Court.

## APPENDIX

### Federal Rules of Criminal Procedure:

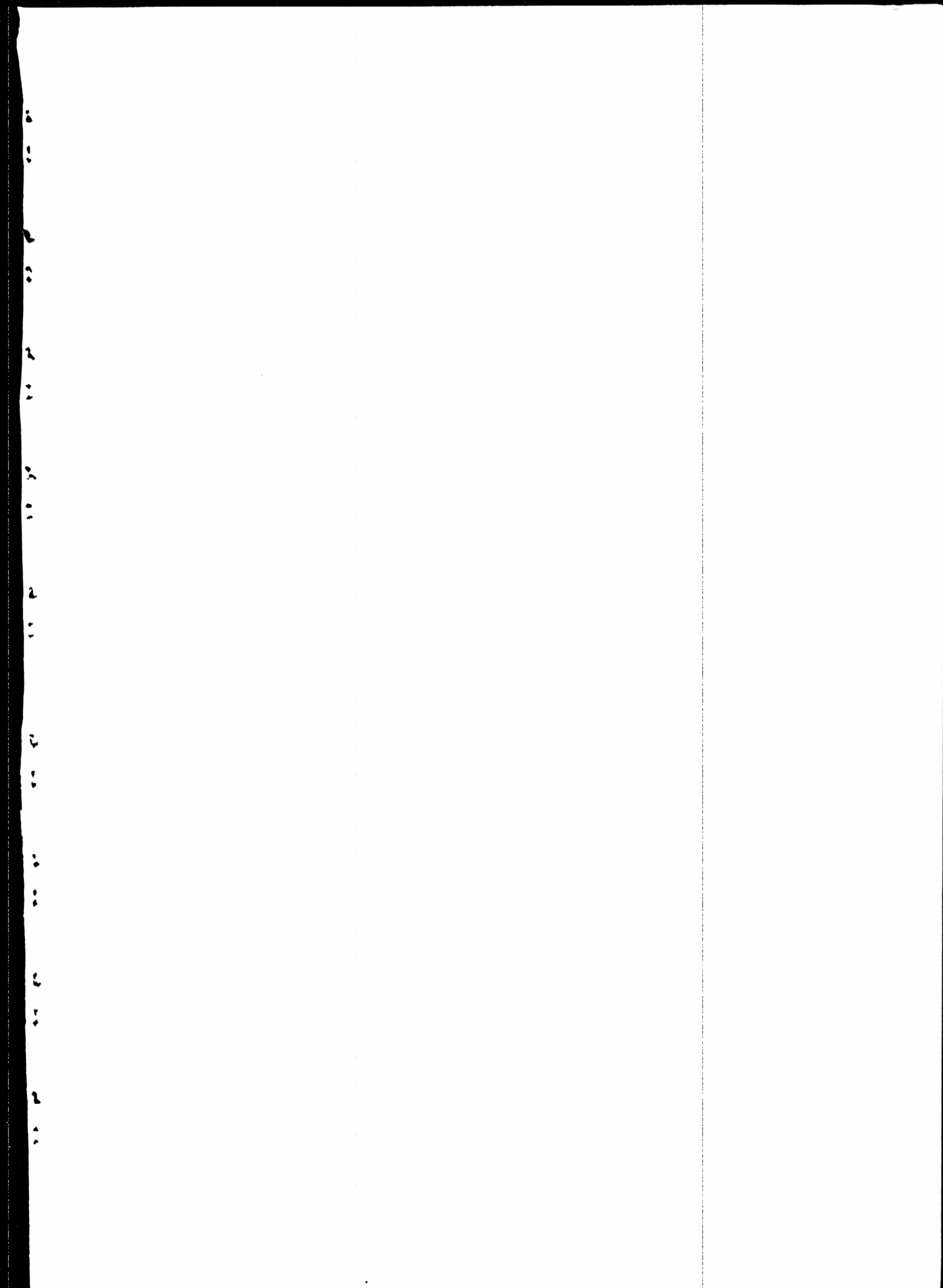
#### Rule 39. Supervision of Appeal.

(a) Supervision in Appellate Court. The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail.

(c) Docketing of Appeal and Record on Appeal. The record on appeal shall be filed with the appellate court and the proceeding there docketed within 40 days from the date the notice of appeal is filed in the district court, but if more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date the first notice of appeal is filed. In all cases the district court or the appellate court or, if the appellate court is not in session, any judge thereof may for cause shown extend the time for filing and docketing.

#### Rule 45. Time.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion ... (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.



37

BRIEF FOR APPELLEE

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**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

\_\_\_\_\_  
No. 17946  
\_\_\_\_\_

CONNELL ROBINSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

\_\_\_\_\_  
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA  
\_\_\_\_\_

DAVID C. ACHESON,  
*United States Attorney.*

FRANK Q. NEBEKER,  
ANTHONY A. LAPHAM,  
*Assistant United States Attorneys.*

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#### QUESTION PRESENTED

In the opinion of the appellee, the following question is presented:

Should this Court consent to hear a full appeal from a judgment of conviction filed more than ten years ago where (1) the direct appeal from that judgment was dismissed more than nine years ago due to appellant's failure to comply with the rules and orders of this Court, and (2) appellant does not show that his failure to perfect his original appeal was the result of excusable neglect, and (3) appellant raises no substantial question as to the lawfulness of his conviction?

(1)



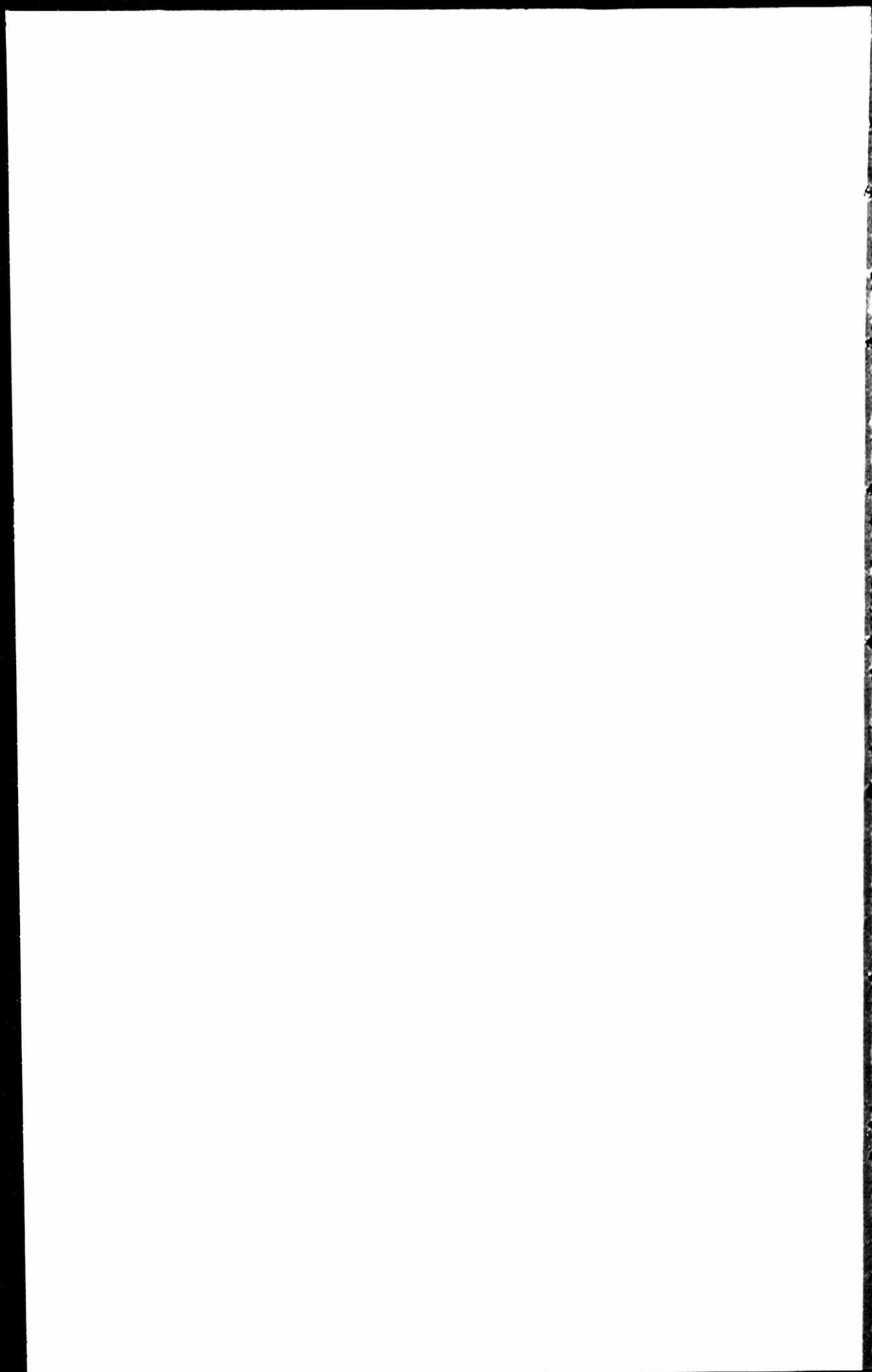
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\*Cases chiefly relied upon are marked by asterisks.



# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 17946

CONNELL ROBINSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

---

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA*

---

## BRIEF FOR APPELLEE

---

### COUNTERSTATEMENT OF THE CASE

An indictment filed September 29, 1952, charged appellant with murder in the second degree (J.A. 1). A jury found him guilty as indicted after a trial in which he was represented by retained counsel.<sup>1</sup> Following the denial of his motion for a

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<sup>1</sup> The evidence tended to show that at approximately 1:30 a.m., on August 9, 1952, appellant, together with his cousin and two strangers, went to 227 O'Neals Court SW., in search of whiskey. Present at that address were the deceased Sam Cox and his common-law wife, Mary Mitchell. According to the testimony of Mary Mitchell, appellant broke a lamp inside the premises, and when Sam Cox protested appellant struck him with his hands and then slashed him with a knife (Tr. 16-17). Appellant ran from the premises and hailed a taxicab being operated by Robert Hensen. Hensen noticed that appellant was bleeding and overheard appellant state that his knife had closed on his finger; he testified that he also heard appellant say: "I tried to kill that bastard" (J.A. 48, 49). Deputy Coroner Rosenberg testified that Cox came to his death "because of multiple stabbing incised wounds, more than ten, ten or twelve or thirteen, on the face, neck and abdomen" (Tr. 41).

Appellant testified in his own defense that Cox had launched an unprovoked attack on him with a long-bladed knife, that he had sustained wounds to his hands and other parts of his body in attempting to fend off this attack, and that it had become necessary for him to fight his way out of the room with a pocket knife he had been carrying in his pocket (Tr. 102-104).

new trial, appellant was sentenced, by Judgment and Commitment filed March 27, 1953, to a term of imprisonment of from five (5) to twenty (20) years (J.A. 3, 4).

A notice of appeal was filed by retained counsel on April 6, 1953 (J.A. 4). On the same day appellant's application to proceed on appeal without prepayment of costs was granted by the District Court and a transcript of the trial proceedings was ordered prepared at the expense of the United States. Thereafter appellant's statement of errors and designation of record was filed on April 9, 1953, a transcript of the proceedings was filed on May 8, and the record of appeal was delivered to retained counsel on May 12 (see docket entries). Between May 12, 1953 and the dismissal of the appeal by Order of this Court filed May 11, 1954 and the ensuing mandate filed July 8, 1954, events took place in the following sequence: (See Clerk's file, Appeal No. 11,800):

|                    |                                                                                                                                                                                                      |
|--------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| May 13, 1953_____  | Letter to Foster Wood, attorney for appellant, stating that record filed May 12, 1953.                                                                                                               |
| June 4, 1953_____  | Foster Wood enters appearance as counsel for appellant.                                                                                                                                              |
| Do_____            | Appellant's Brief submitted by Foster Wood.                                                                                                                                                          |
| June 29, 1953_____ | Appellee's Motion for Extension of Time to File Brief.                                                                                                                                               |
| July 9, 1953_____  | Order extending time for filing appellee's brief to July 28, 1953.                                                                                                                                   |
| July 14, 1953_____ | Appellee's Motion to Strike Appellant's Brief and Dismiss Appeal for failure to comply with Rules 17(a) and 17(c) of the General Rules of this Court.                                                |
| July 23, 1953_____ | Reply to Motion to Strike Appellant's Brief.                                                                                                                                                         |
| July 28, 1953_____ | Appellee's Motion for Extension of Time to File Brief until twenty days after disposition of appellee's Motion to Strike or twenty days after appellant files a brief which complies with the Rules. |
| Aug. 10, 1953_____ | Order extending appellee's time to file a brief as requested.                                                                                                                                        |
| Aug. 11, 1953_____ | Order that action on appellee's Motion to Strike Appellant's Brief and Dismiss the appeal and on Appellant's Reply be deferred.                                                                      |

- Aug. 11, 1953..... Further Order that appellant be allowed to August 22, 1953, within which to file a memorandum in support of his contention that a substantial question is involved in the appeal.
- Aug. 22, 1953..... Appellant's Motion for Leave to Dismiss Appeal, counsel being of the opinion that no substantial question of law is presented by the appeal.
- Sept. 9, 1953..... Opposition to Motion for Leave to Dismiss Appeal (submitted by the appellant Robinson with the notation "Prepared by and for me with assistance"). This Opposition includes requests "that counsel be allowed to withdraw from said case as counsel of record; that he be permitted to proceed as counsel in his own behalf, *Pro Se*; that an order issue for the stenographic transcript in said case to be prepared by the Official Reporter; that appellant be allowed to continue the preparation and filing of said case without prepayment of costs and in *forma pauperis*; and that he be granted a 90-day extension of time for the same".
- Sept. 25, 1953..... Order denying appellant's Motion to Dismiss the Appeal.
- Do..... Further Order that Foster Wood be allowed to withdraw his appearance for appellant.
- Do..... Further Order that appellant be allowed to October 25, 1953, within which to retain other counsel or proceed with the appeal himself, and that the time for filing appellant's brief be extended to November 25, 1953.
- Nov. 5, 1953..... Appellant's Motion for Extension of Time and Order for Stenographic Transcript and Leave for Use in Preparation and Filing of Brief and Appendix.
- Nov. 17, 1953..... Order that the Clerk be authorized to transmit a transcript of the record to Lorton Reformatory for use of appellant.
- Do..... Further Order that time for filing appellant's brief be extended to December 21, 1953.
- Dec. 10, 1953..... Transcript of Record returned from Lorton.
- Dec. 19, 1953..... Appellant's Motion for Extension of Time to File Brief and Appendix to February 21, 1954.
- Dec. 28, 1953..... Order extending time for filing appellant's brief and appendix to February 21, 1954.

- Mar. 1, 1954\_\_\_\_\_ Letter from appellant enclosing brief and appendix.
- Mar. 3, 1954\_\_\_\_\_ Letter from Deputy Clerk returning papers entitled Brief and Appendix for failure to comply with the Rules, and advising appellant: "If you desire to file your brief, it is necessary that you file an original and three copies of a motion for an extension of time to file your brief, time having expired, showing thereon proof of service in compliance with Rule 31(h)(3) and showing excusable neglect as provided by Rule 32(b) of said Rules".
- Apr. 6, 1954\_\_\_\_\_ Order directing appellant to show cause why appeal should not be dismissed for failure of appellant to file a brief within time.
- Apr. 8, 1954\_\_\_\_\_ Return receipt showing delivery of April 6 Order to appellant Robinson.
- Apr. 21, 1954\_\_\_\_\_ Letter from Deputy Clerk advising appellant that his appeal would be dismissed unless an answer to the show cause order was forthcoming.
- May 11, 1954\_\_\_\_\_ Order dismissing appeal.

A motion to set aside sentence pursuant to 28 U.S.C. § 2255 was brought by appellant on July 20, 1956, but was withdrawn in open court with appointed counsel present on March 1, 1957. A second § 2255 motion was filed by appellant on January 10, 1963 (J.A. 5-12). This motion was denied by an order of the District Court filed March 8, 1963. This appeal followed.

#### **RULES INVOLVED**

Rule 39, Federal Rules of Criminal Procedure, provides:

(a) *Supervision in Appellate Court.*—The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail.

Rule 45, Federal Rules of Criminal Procedure, provides:

(b)(2) *Enlargement*.—When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rule 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

#### SUMMARY OF ARGUMENT

I. The District Court acted properly in denying appellant's Section 2255 motion without a hearing. The files and records of the case conclusively showed that appellant was not entitled to relief.

II. This Court should not reopen the direct appeal from the judgment of conviction which was dismissed more than nine years ago due to appellant's failure to comply with the General Rules of this Court. Appellant's contention that his failure to perfect that appeal was the result of excusable neglect is positively refuted by the files of the Clerk of this Court. Even if true, appellant's allegations would not constitute a showing of excusable neglect. Moreover, appellant, in his attempt to reactivate the direct appeal, raises no substantial question as to the lawfulness of his conviction.

#### ARGUMENT

I. The collateral attack on the judgment on conviction, which appellant now appears to have abandoned, was not sufficient to require a hearing in the District Court

Although the case reaches this Court as an appeal from the District Court's denial of a motion to vacate judgment and set aside sentence pursuant to 28 U.S.C. § 2255, appellant does not now contend that relief should have been granted to him under section 2255. Indeed, appellant concludes his



brief with a request that the section 2255 appeal be dismissed as moot (appellant's brief, p. 12).

The collateral attack on the judgment, which appellant now appears to have abandoned, was insufficient to begin with. Appellant challenged the indictment but failed to allege any facts which indicate that the indictment was in any way defective, much less so defective that the District Court never acquired jurisdiction. *Martin v. United States*, 101 U.S. App. D.C. 329, 248 F. 2d 651 (1957). He claimed that he was innocent and that the evidence was insufficient to convict, but these issues are not cognizable under section 2255. *Upshaw v. United States*, 102 U.S. App. D.C. 299, 252 F. 2d 863 (1958); *Hall v. United States*, 98 U.S. App. D.C. 341, 235 F. 2d 838 (1956). Similarly, the claim that statements were illegally obtained may not be collaterally raised. *Smith v. United States*, 88 U.S. App. D.C. 80, 187 F. 2d 192 (1950), *cert. denied*, 341 U.S. 927 (1951); *Hodges v. United States*, 108 U.S. App. D.C. 375, 282 F. 2d 858 (1960). Finally, the general assertions of ineffective assistance of counsel fall far short of the persuasive showing which alone will serve to collaterally impeach a judgment. *Diggs v. Welch*, 80 U.S. App. D.C. 5, 148 F. 2d 667 (1945), *cert. denied*, 325 U.S. 889 (1945); *Edwards v. United States*, 103 U.S. App. D.C. 152, 256 F. 2d 707 (1958), *cert. denied*, 358 U.S. 847 (1958); *Mitchell v. United States*, 104 U.S. App. D.C. 57, 259 F. 2d 787 (1958), *cert. denied*, 358 U.S. 850 (1958); *Gray v. United States*, 112 U.S. App. D.C. 86, 299 F. 2d 467 (1962).

Since the files and records in the case conclusively show that appellant is not entitled to collateral relief, the District Court acted properly in denying appellant's motion without a hearing.

**II. This court should not reopen a direct appeal dismissed more than nine years ago where the failure to perfect such an appeal was not the result of excusable neglect and where no substantial questions of law are raised**

Appellant is asking this Court to hear a direct appeal from the original judgment of conviction. He argues that this Court obtained jurisdiction over such an appeal by the filing of a

timely Notice of Appeal on April 6, 1953, that the appeal involved substantial questions of law and that the failure to perfect it was the result of excusable neglect, and that this Court should therefore exercise its discretion under Rules 39(a) and 45(b)(2) of the Federal Rules of Criminal Procedure and permit the perfection of his direct appeal out of time. This argument must be regarded as being in the nature of a motion to this Court to recall its mandate of July 8, 1954, to stay the execution of the judgment, to vacate its order of May 11, 1954, and to hear a full appeal on the merits.

Coming as it does some ten years after conviction and some nine years after the dismissal of the direct appeal, appellant's argument is made with the assurance that the government could not re-try him if his conviction was now overturned. Even in the unlikely chance that the witnesses could now be located, their recollections of events so long past would hardly be reliable. It is difficult to imagine a more extreme example of a situation which the procedural rules requiring timely perfection of an appeal were designed to prevent. But even assuming that there are circumstances in which this Court would consent to the reopening of a direct appeal more than nine years after its dismissal, surely those circumstances do not exist where, as here, the appellant makes no showing of excusable neglect and raises no substantial question as to the lawfulness of his conviction. Cf. *Christoffel v. United States*, 88 U.S. App. D.C. 1, 190 F. 2d 585 (1951).

**A. Appellant's failure to perfect his appeal from the judgment of conviction was not the result of excusable neglect**

Appellant supports his plea of excusable neglect with allegations that retained counsel abandoned him without notifying this Court, that he was left unassisted and ignorant of the procedure and manner in which to perfect his appeal, and that under the circumstances this Court could not until now have become aware of the difficulties he was encountering (appellant's brief, pp. 4, 7-8). A chronological review of the papers filed with the Clerk of this Court at the time of the direct appeal (see Counterstatement in Appellee's Brief) not only serves

to place appellant's allegations in their proper perspective but shows beyond all question that each allegation is totally unfounded.

Far from having been abandoned by his retained counsel, the records show that, after such counsel indicated to this Court that no substantial question of law was presented and moved to dismiss the appeal (see file entry on August 22, 1953), appellant himself filed an Opposition to this motion requesting "that counsel be allowed to withdraw from said case as counsel of record; that he be permitted to proceed as counsel in his own behalf, *Pro Se*" (see file entry on September 9, 1953). Far from having withdrawn without notifying this Court, the records show that retained counsel was allowed to withdraw his appearance for appellant by Order of this Court (see file entry on September 25, 1953). The records further show that from the time appellant was permitted "to retain other counsel or proceed with the appeal himself" on September 25, 1953, he was in constant communication with this Court; that he moved for and was granted numerous extensions of time in which to file his brief; that he moved for and received a transcript of the record. And far from being unadvised or ignorant of the steps necessary to perfect his appeal, the records show that appellant was very well aware what steps were required; that he was notified by letter from the Deputy Clerk on March 3, 1954, that there was required another motion for extension of time to file his brief, time having expired; that he was served with a copy of the Order of this Court filed April 6, 1954, directing him to show cause why his appeal should not be dismissed; that he was advised by letter from the Deputy Clerk on April 21, 1954, that his appeal would be dismissed unless an answer to the show cause order was forthcoming. In light of these facts the allegation that appellant's difficulties in prosecuting his appeal now reach this Court's cognizance for the first time can only be regarded as frivolous.

Even if appellant's allegations were not altogether refuted by the file entries in the case, they would nevertheless be insufficient to support his claim of excusable neglect. *Reid v. United States*, 108 U.S. App. D.C. 323, 282 F. 2d 293 (1960).

Appellant's reliance on *Belton v. United States*, 104 U.S. App. D.C. 81, 259 F. 2d 811 (1958) is misplaced inasmuch as that case dealt with the adequacy of the notice of appeal and involved an appellant who believed that the denial of his request to appeal in *forma pauperis* had put an end to all his rights of appeal. Likewise, *Blunt v. United States*, 100 U.S. App. D.C. 266, 244 F. 2d 355 (1957), is inapplicable because it involved an appellant who was in jail and without counsel from the day of sentencing and probably did not know that he had been allowed to appeal. In the instant case, appellant not only knew of his right to resort to this Court but pursued his appeal, first through retained counsel and then "*pro se*", from April, 1953 to April 1954. If he was not willing or able to make a showing of excusable neglect when called upon to do so in March, 1954, then surely he is not in a position to do so now. Moreover, appellant has not called the attention of this Court to a single fact of which this Court was not already aware when it dismissed his appeal in May, 1954.

**B. Appellant raises no substantial question of law as to the lawfulness of his conviction**

Appellant contends that the trial court erred in permitting the prosecutor to recall the witness Hodge in rebuttal, in permitting the prosecutor to read to the jury from a prior inconsistent statement made by Hodge which allegedly never had been received in evidence, and in instructing the jury on the issue of an absent witness.

John Hodge appeared as a witness in the government's case-in-chief. He then reappeared at the conclusion of the case for the defense, hopefully to rebut specific points in the testimony given by appellant in his own behalf. When Hodge stated that he did not know the answers to two questions propounded by the prosecutor, the latter sought to establish that he had given an inconsistent statement to the police (Tr. 159). Since the prosecutor had previously made use of such a statement to impeach Hodge, an objection taken by defense counsel at this point was sustained and the witness was excused (Tr. 161, 162). Under these circumstances, no prejudice to appellant could be shown.

In his opening argument to the jury the prosecutor read from a portion of the statement given by Hodge to the police and explained that his only purpose in offering it had been to discredit Hodge as a witness<sup>2</sup> (Tr. 169, 170). Since the instructions to the jury included a specific reference to this statement and an admonition that it could be considered for purposes of impeachment only, there was substantial compliance with the standards outlined by this Court for the use of prior inconsistent statements after a claim of surprise. *Wheeler v. United States*, 93 U.S. App. D.C. 159, 211 F. 2d 19 (1953); *Bartley v. United States*, No. 17592, D.C. Cir., decided May 29, 1963.

Edward Houston did not appear as a witness either for the prosecution or for the defense. The prosecutor explained that he was still looking for Houston (Tr. 202), but had not been able to locate him on the date of the trial (Tr. 170, 194-195). The trial judge nevertheless instructed the jury that an inference could be drawn from the absence of a witness peculiarly available to one side or the other that the testimony of such witness would have been unfavorable to the party who failed to call him (Tr. 207, 208), and defense counsel argued to the jury that Houston's absence raised the presumption that his testimony would have been adverse to the government (Tr. 179-180, 190-191). Since Houston was not available to the prosecution on the trial date, no legitimate inference about his testimony could be drawn from his absence, and trial counsel

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<sup>2</sup> After testimony was elicited from Hodge on cross-examination to the effect that he had not seen Mary Mitchell in the room during the trouble between appellant and Cox, the prosecutor claimed surprise and sought, on re-direct examination, to impeach Hodge's testimony by introducing a signed typewritten statement given by him to the police. The statement was not admitted at the time because, Hodge having testified that he could not read, it lacked a proper foundation (Tr. 38). Subsequently, Detective Waters testified that he had typed the statement as Hodge dictated it, that he had read it back and that Hodge had then signed it (Tr. 90). There followed a bench conference which concerned itself with the value of the statement as impeaching evidence and during which the prosecutor referred to the portions of the statement he wished to use. Those parts of the statement were then received in evidence without objection (Tr. 94) and questions based on them were asked of Hodge without objection (Tr. 95). Appellant's allegation that the statement was never received in evidence is therefore incorrect.

was treated more generously than he should have been in even being allowed to make the argument. See 2 Wigmore, Evidence (3d ed. 1940) §§ 286, 288.

CONCLUSION

Wherefore, it is respectfully requested that the judgment of the District Court be affirmed.

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